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Nos. 94-929, 94-631, and 94-797

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, APPELLANT

v.

DAVIDA JOHNSON, ET AL.

ZELL MILLER, ET AL., APPELLANTS

v.

DAVIDA JOHNSON, ET AL.

LUCIOUS ABRAMS, JR., ET AL., APPELLANTS

v.

DAVIDA JOHNSON, ET AL.

ON APPPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

REPLY BRIEF FOR THE UNITED STATES

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1. a. In our opening briefs in this case and in *United States* v. *Hays*, Nos. 94-558 and 94-627, we argue in some detail that the configuration of an electoral district is not subject to strict scrutiny

merely because the State intended to—and did—create the district with a majority-minority population. See U.S. Br. 17-22; *Hays* U.S. Br. 14-20. Underlying our argument is the premise that subjecting a district to strict scrutiny on that basis would, in effect, require States to place racial minority groups at a political disadvantage.

One important purpose of drawing district lines in one place rather than another is to recognize politically cohesive communities of voters. Minorities in this country—and, in particular, African-Americans—frequently constitute distinctive geographical and political communities, and the evidence of political cohesion of African-Americans in this case, see U.S. Br. 37-38, establishes that African-Americans living in the area encompassed by the Eleventh District of Georgia constitute such a community, with many common political interests.[1]

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[1] The political cohesion of this minority group is explicable at least in part as a result of the political interests shared by African-Americans in the Eleventh District. Extensive evidence on that subject was presented at trial. See, *e.g.*, 6 Tr. 27-48 (testimony of Rev. Mitchell), 137-194 (testimony of Dr. Marsha Darling); see also J.S. App. 45a (referring to such evidence). The district court found such evidence at least "partially convincing," *id.* at 44a, although it expressed doubt that "the poor black populations of coastal Chatham County feel a significant bond to the black neighborhoods of metro Atlanta." *Ibid.* Nor did the court doubt that African-Americans in the Eleventh District were politically cohesive. It found that "the average percentage of blacks voting for white candidates ranged from 20%-23%," *i.e.*, 77% to 80% of African-Americans voted for African-American candidates when they had the opportunity. *Id.* at 82a. For the reasons given in our opening brief, see U.S. Br. 37 n.20, even those figures are substantially understated. Dr. Lichtman, the

To hold that the intent to create a district in which they are the majority is, for that reason alone, suspect under the Equal Protection Clause would be to place minority racial groups with distinctive political interests at a severe disadvantage in the political process. Under such a holding, a State that intentionally draws a district to recognize the voting power of a politically cohesive minority group—even a district that indisputably adheres to the State's traditional districting practices with regard to compactness, etc.—would automatically subject that district to strict scrutiny if litigation ensued. The legal uncertainty and litigation costs that would result would give the States a powerful reason not to recognize the political interests of such groups, resulting in a substantial political disadvantage to the groups whom the Equal Protection Clause was primarily designed to protect.[2]

b. Appellees in some places argue that an intentionally created majority-minority district must nevertheless be subjected to strict scrutiny under the Equal Protection Clause. For example, they state that "[u]nder [*Village of*] *Arlington Heights* [v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977),] and *Hunter v. Underwood*, 471 U.S.

United States' expert, using statewide and congressional Democratic primary elections in the Eleventh Districts, found that 65% to 97% of African-Americans voted for African-American candidates in races involving white candidates as well; in seven of the eight races analyzed, that figure was 89% or higher. See U.S. Exh. 24, tables 1-2.

[2] Minority political groups would be at an even greater political disadvantage under the district court's view that "such a [racially defined] community of interest is *barred* from constitutional recognition." J.S. App. 44a (emphasis added).

222-228 (1985), once a racial classification is shown to have been a 'substantial' or 'motivating' factor behind an enactment, the burden then shifts to the state to demonstrate that the law would have been enacted without this factor." Appellees' Br. 35. Precisely because members of a minority group are in the minority in a State's overall population, however, majority-minority districts are ordinarily created by design, not coincidence. Therefore, under appellees' approach, all majority-minority districts will potentially be subject to strict scrutiny.

Appellees claim that, under the standard they advocate, "it would be very difficult to even conceive of a congressional district that would be challenged (let alone subjected to strict scrutiny) without highly irregular features tied to race." Appellees' Br. 34. That statement is wrong. Under appellees' standard, a perfectly compact district comprising a politically cohesive majority-minority community or communities would be subject to strict scrutiny so long as the State had a choice in drawing the district lines and drew them as it did in order to provide the minority community with representation. Should appellees' standard be adopted, few majority-minority districts would avoid strict scrutiny. Indeed, appellees appear to recognize that fact when they acknowledge that, "[*f*]*or practical reasons*, the District Court * * * added the requirement that race be the 'overriding' or 'predominant' force determining the lines of the district." Appellees' Br. 35 (emphasis added). As we argue in our opening brief, however, the district court's "predominant motive" standard poses essentially that same prospect that virtually every majority-minority

district will be subject to strict scrutiny. See U.S. Br. 18-19.[3]

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[3] The district court's numerous different formulations of the standard also give a hint of the analytical difficulties that would attend its application. The district court thus states variously that the test is whether race "was the *substantial or motivating consideration* in creation of the district in question," J.S. App. 35a (footnote omitted); whether race was the "*overriding, predominant force* determining the lines of the district," *ibid.*; whether race is not merely "one factor among *many of equal or greater significance* to the drafters," *ibid.*; whether "race was the most prominent element driving the legislatures' planning," *id.* at 35a n.19; and whether race was "not * * * one motivation among others of equal strength propelling the process," *ibid.*

Amici Washington Legal Foundation, et al., assert that our objections to inquiring into a legislature's "overriding" or "predominant" motive are "disingenuous coming from the federal government, which regularly engages in exhaustive examination of legislative intent in connection with its pre-clearance authority under § 5 of the Voting Rights Act." Br. 13. Our Section 5 inquiry, however, does not require identification of an "overriding" or "predominant" motive. As we explain in our opening brief, see U.S. Br. 32-34, our Section 5 inquiry looks into the possible existence of an improper legislative purpose to discriminate, employing the accepted "motivating factor" analysis derived from this Court's decision in *Arlington Heights*. There is nothing improper, however, about a legislative purpose to recognize the political interests of a racial minority group in the same way that other (and often competing) political interests are recognized in a State. For similar reasons, this Court has upheld redistricting plans that plainly were based on the political affiliations of voters, see, *e.g.*, *Davis* v. *Bandemer*, 478 U.S. 109 (1986); *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), while making clear that other governmental decisions based on political affiliation are subject to heightened scrutiny, see *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 74 (1990). See generally Amicus Curiae Georgia Ass'n of Black Elected Officials Br. 12-18.

For the reasons given above and in our opening brief, we submit that the State's intent to create a majority-minority district—whether analyzed under a "motivating factor" standard or the "predominant motive" standard adopted by the district court in this case—does not alone require the application of strict scrutiny. Instead, this Court's decision in *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993), provides the appropriate guidepost. Where the shape of a challenged district is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting," *Shaw*, 113 S. Ct. at 2824, it betrays the State's intent to draw lines for the minority group that it is unwilling to draw for other politically cohesive groups. In that "rare" circumstance, *id.* at 2825, the Court has held that the State must justify its action under strict scrutiny.

2. We state in our opening brief that the test for "extreme irregularity" or "bizarreness" under *Shaw* is whether, "in drawing the district, the State departs dramatically from its traditional districting practices." U.S. Br. 14. Appellees do not appear to disagree; they state that "[r]acial gerrymandering occurs when the State draws a district that artificially manipulates non-compact dispersed minority populations into a majority black district without regard for the State's traditional districting principles." Appellees' Br. 24. But they argue that the district court's determination that the Eleventh District is "bizarre" under that standard was not clearly erroneous.

The district court, however, gave no indication that it employed the correct legal standard in reaching its conclusion. Instead, as we explain in our opening brief (U.S. Br. 25), the court approached the "bizarre-

ness" inquiry by assuming that its purpose was to uncover whether the State had an "overriding objective to include minority populations in the Eleventh [District]." J.S. App. 47a. That improper focus led the district court to give inappropriate weight to several facts that were of little or no relevance, and to disregard factors that should have guided the inquiry. See U.S. Br. 25-27. For the reasons given in our opening brief, see U.S. Br. 23-25, and by Judge Edmondson in his dissenting opinion, see J.S. App. 96a-100a, we believe that the Eleventh District satisfies the *Shaw* standard.

Appellees argue that the Eleventh District is a dramatic departure from Georgia's traditional districting principles because it splits eight counties (while leaving 14 intact) and the Georgia redistricting plan as a whole splits 31 municipalities. Appellees' Br. 14-15. As appellees concede, however, Georgia has split counties in the past. *Id.* at 15. Equally important, the current Georgia redistricting plan splits numerous counties for reasons that in many places have nothing to do with race. See U.S. Br. 24 n.7. The Sixth District, for example, is comprised of parts of five different counties and no intact counties at all. Although appellees in a footnote claim that "[t]he [Sixth] district had to split counties due to one-person one-vote and the need to maintain the majority-minority Fifth District," Appellees' Br. 22 n.21, they cite to nothing in the record to support that statement. In fact, the evidence showed that the configuration of the Sixth

District was based on a desire to achieve certain largely political goals.[4]

With respect to split municipalities, appellees also concede that Georgia's plans in the past have split municipalities for reasons other than compliance with the one-person, one-vote requirement. Appellees' Br. 15. Moreover, although they state that the current Georgia plan as a whole splits 31 municipalities, see *ibid.*, they do not state that only six of these municipalities are split by the Eleventh District.[5] Elsewhere in the plan, other districts split more municipalities for reasons that appear to have nothing to do with race.[6]

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[4] Senator Garner, who was the majority leader of the Georgia Senate, a member of its reapportionment committee, and a member of the conference committee on the reapportionment bills, and Speaker Murphy of the Georgia House of Representatives both testified that the Sixth District's configuration was due in large part to Murphy's desire that the district not include his residence. See 3 Tr. 229 (Garner); 2 Tr. 75-79 (Murphy); accord 3 Tr. 264-265 (testimony of Rep. Hanner, Chair of House Reapportionment Committee); 4 Tr. 349 (testimony of Oscar Persons). Lieutenant Governor Pierre Howard also testified by videotaped deposition, the transcript of which was admitted in evidence as Plaintiffs' Exhibit (PX) 216A, see 4 Tr. 184. Referring to the Sixth District, Howard testified that the legislature was "trying to make sure that it's as Republican as possible." PX 216A, at 95.

[5] The six municipalities are Augusta, Savannah, Milledgeville, Port Wentworth, Thunderbolt, and Washington.

[6] For example, six of the 31 municipalities on the list are in Gwinnett County and are split between some combination of the Fourth, Sixth, and Tenth districts, all of which are majority white. Those municipalities are Duluth, Lawrenceville, Norcross, Snellville, Sugar Hill, and Suwanee. The majority-white Sixth District alone splits eight municipalities,

3. Appellees argue (Br. 37-39) that, if strict scrutiny is applied to the Eleventh District, the district does not survive it, because in their view the State in this litigation has not itself advanced any interest that it considers to be compelling and that motivated it in creating the Eleventh District. In appellees' view, the State's litigation position on this issue is dispositive, even though private individuals and the United States are now also parties defendant and offer compelling interests in support of the State's position.

Appellees' view is mistaken. When applying strict scrutiny, the question is whether the challenged state action (in this case, the creation of the Eleventh District) was narrowly tailored to satisfy a compelling state interest. As a plurality of this Court stated (in a passage quoted by appellees themselves, see Appellees' Br. 38-39), "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.). The crucial question is thus whether the legislative body—not

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two more than are split by the Eleventh District. They are Duluth, Lawrenceville, Norcross, Sugar Hill, Suwanee, Marietta, Smyrna, and Woodstock. This information and that in the previous footnote are derived by locating the cities on appellees' list on a map of Georgia; appellees themselves did not introduce evidence about which districts split each of the municipalities. It should be noted that appellees' list is in any event misleading, since it omits the numerous split municipalities in the present and past plans that overlap more than one county. See 2 Tr. 138-140 (testimony of Linda Meggers).

the lawyers representing the State or state officials in later litigation—was pursuing a compelling state interest and employed means narrowly tailored to advance it. As this Court explained in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 (1975), "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." The appropriate inquiry turns on an examination of "the statutory scheme itself and * * * the legislative history"—not the litigation positions advanced by attorneys representing one of the parties. *Ibid.* Accord *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 728 (1982).

In any event, there is no doubt that, at the time the State adopted its plan, the State believed that creating the Eleventh District was necessary to comply with Section 5 of the Voting Rights Act, and that such compliance was a compelling state interest that supported the State's action here. The State knew that the Attorney General had interposed Section 5 objections to the two previous redistricting plans, a fact that in our view is sufficient to support the State's belief that its creation of the Eleventh District was necessary to comply with Section 5. Moreover, Mark Cohen, a Senior Assistant Attorney General of Georgia, testified at trial that he advised the leadership of the state legislature that the State should not file a Section 5 declaratory judgment suit to obtain preclearance for the State's second plan, because he thought that the State would lose such a suit, as it had lost a similar Section 5 suit ten years earlier. 5 Tr. 5-6. The district court made no finding that the State did not create the Eleventh District on the basis of that belief. Thus, whatever may be the

State's position now in litigation, the state legislature that drew the Eleventh District was motivated by a desire to comply with Section 5 of the Voting Rights Act.

The state legislature also acted for the purpose of complying with Section 2 of the Voting Rights Act.[7] The district court did not suggest otherwise, but instead concluded that, in its view, the failure to draw a third majority-minority district would not have subjected the State to Section 2 liability. For the reasons given in our opening brief in this case and in *Hays*, we believe that the district court erred in undertaking a *de novo* inquiry into that issue. See U.S. Br. 28-29; *Hays* U.S. Br. 27-28. The question before the district court was not whether a court would have found Section 2 liability in a hypothetical lawsuit challenging the State's failure to create a third majority-minority district. Rather, the question was whether the objective facts considered by the State would reasonably support a conclusion that a prima facie case existed under Section 2. As we argue in our opening brief, U.S. Br. 37-38, such facts were before the legislature.

The State has also contended throughout this litigation that it acted to advance a compelling interest in affording minority voters a fair opportunity for representation, and that contention is supported by the record. See *e.g.*, 4 Tr. 239

[7] Georgia was facing a number of statewide Section 2 challenges at the time it enacted its redistricting legislation. See U.S. Br. 38 n.21. Moreover, as appellees themselves emphasize, at the time the legislature acted, it was also facing a pending suit alleging that the State's then-current redistricting plan was in violation of Section 2. See Appellees' Br. 22 n.22.

(testimony of State Rep. Brooks); PX 216A, at 55 (deposition of Lieut. Gov. Howard). Where minority voters have little opportunity to elect candidates of their choice because of racially polarized voting, the State has an interest, independent of the Voting Rights Act, in drawing majority-minority districts. See U.S. Br. 39-40. Such a situation exists in Georgia, as demonstrated both by the direct evidence of racial polarization and by the fact that, with one exception, all of the black state legislators in Georgia were elected from majority-minority districts. See U.S. Br. 37-38. Although Section 2 of the Voting Rights Act requires States to create majority-minority districts in some circumstances, nothing in Section 2 suggests that it was intended to set a limit on the extent to which States could do so.

4. Appellees argue (Appellees' Br. 39-43) that the Attorney General's Section 5 objections to the State's two earlier plans did not provide a basis for the State to believe that creating the State's final plan, with three majority-minority districts and the current configuration of the Eleventh District, was required by Section 5 of the Voting Rights Act. They base their argument on their allegation that the Attorney General's objections were meritless, and that the objections could therefore not have provided the State with a reasonable basis for believing that its actions were necessary to comply with Section 5.

As we explain in our opening brief, the question whether the Attorney General was correct in objecting to Georgia's first two plans was not before the district court.[8] Given the Attorney General's role in

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[8] Notwithstanding extensive statements on the issue in its opinion, the district court on several occasions assured the

the Section 5 statutory scheme, a State must ordinarily be able to rely on a Section 5 objection as an administrative finding of discrimination that can justify remedial action by the State. See U.S. Br. 30. Moreover, to permit back-door review of the merits of a Section 5 objection in the course of a *Shaw* challenge to a districting plan is inconsistent with the statutory scheme. Congress precluded all direct review of the Attorney General's objections and channeled all litigation about the merits of those objections to a special judicial preclearance action in the District Court for the District of Columbia. See *Morris* v. *Gressette*, 432 U.S. 491, 504-505 (1977); see also *McCaïn* v. *Lybrand*, 465 U.S. 236, 246-247 (1984); *McDaniel* v. *Sanchez*, 452 U.S. 130, 150-151 (1981); *Perkins* v. *Matthews*, 400 U.S. 379, 385 (1971). If a Section 5 objection by the Attorney General is not clearly insupportable, it therefore provides a sound basis for the State to take action.

We argue in our opening brief that the Attorney General's objections in this case were amply supported. U.S. Br. 31-34 (citing *Arlington Heights*, 429 U.S. at 266-267). Appellees do not take issue with

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parties that it would *not* review the merits of the Attorney General's Section 5 objection. See, *e.g.*, Order of March 30, 1994, at 3 n.2 ("Plaintiffs have not petitioned the Court to directly rule on the correctness or the constitutionality of the DOJ's pre-clearance decisions."); Order of June 6, 1994, at 4-5 ("The DOJ's refusals to preclear the State's first two congressional plans submitted may not be reviewed for their correctness; those refusals and communications regarding the preclearance process for the current plan may be probative, however, insofar as they may have provided the impetus for the drawing of the plan at issue here.").

that analysis; what they offer instead is unpersuasive.

Appellees claim that the Attorney General's objections to the two earlier plans were unsound because the Attorney General was employing a mistaken "maximization" or "proportionality" standard in assessing purpose under Section 5. Appellees' Br. 40-43. As we have explained, although it may be the case that some individuals or interest groups in Georgia desired "maximization" or "proportionality," and that others brandished those terms to achieve goals of their own,[9] the Attorney General has never employed those standards in analyzing purpose under Section 5 and did not do so here. See U.S. Br. 35-36.[10]

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[9] Individuals in Georgia who have their own goals in the redistricting process are not and were not authorized to speak for the Attorney General of the United States concerning the standards to be applied in making Section 5 preclearance decisions or any other matter. Appellees' citation to statements by those individuals thus have no bearing on the issue. See, *e.g.*, Appellees' Br. 18 (quoting statement of State Rep. Tyrone Brooks), 20-21 (quoting statements of State Sen. Garner).

[10] Appellees quote the district court's statement that Thomas Armstrong, an attorney for the Department of Justice, testified that he "could not recall seeing any evidence of discriminatory motives on the part of the Georgia legislature." Appellees' Br. 40. See J.S. App. 13a n.7. The precise question asked of Mr. Armstrong was whether he could "recall * * * a single piece of evidence that would suggest that * * * *the failure to go to* [*Savannah*] was originally based on * * * discriminatory motives, other than the mere fact that it could be done." 4 Tr. 148-149 (emphasis added). He responded that he could not recall any such evidence. 4 Tr. 149. It was undisputed, however, that Mr. Armstrong's responsibilities did not include examining the purpose issue in this case. See 4 Tr. 149. Therefore, Mr. Armstrong's

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For the foregoing reasons and those stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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statement at trial does not cast doubt on the validity of the Section 5 objections in this case.